



Both MERS and MTC filed motions to dismiss Plaintiff's complain for, among other reasons, its failure to state a claim. (Doc. ##11 and 14.) In its September 3, 2009 Order, the Court granted both motions in part and ordered "that Plaintiff has 30 days to file an amended complaint to cure the deficiencies identified herein." (Doc. #26.) On October 2, 2009, Plaintiff filed an Amended Complaint. (Doc. # 27.) MTC has now moved, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Arizona Revised Statutes § 33-807(E), to dismiss the Amended Complaint. (Doc. #29.) MERS has also moved to dismiss pursuant to Rules 12(b)(5) and 12(b)(6). (Doc. #30.)

## **II. MERS's and MTC's Motions to Dismiss Pursuant to Rule 12(b)(6)**

MTC and MERS both seek dismissal under Rule 12(b)(6) for failure to state a claim. To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief," so that the defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

The pleading standard of Rule 8 requires more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 555). To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, if accepted as true, states a claim to relief that is "plausible on its face." *Iqbal*, 129 S.Ct. at 1949. Facial plausibility exists when the pleader pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

### **A. Plaintiff's TILA Claims**

Plaintiff's Amended Complaint fails to meet the short plain statement requirement of Rule 8 in relation to MTC and MERS. While the complaint now lists several specific TILA violations, they are all in the form of mere legal conclusions and do not inform anyone of facts explaining which Defendants committed these violations. (Doc. #27 at 2.) As *Iqbal*

1 states, a plaintiff doing no more than stating a legal conclusion is insufficient to meet Rule  
2 8's pleading requirements. 129 S.Ct. at 1949.

3 Further, the TILA claim fails because Plaintiff has not pled facts sufficient to show  
4 that MTC or MERS are "creditors" under TILA. TILA disclosure requirements only apply  
5 to "creditors" as defined in 15 U.S.C. § 1602(f). *See, e.g.,* 15 U.S.C. § 1635(a) ("The  
6 creditor shall clearly and conspicuously disclose. . ."); *see also Tomkins v. Bank of Am. Nat'l*  
7 *Ass'n*, No. CV-09-2014-PHX-GMS (D. Ariz. Jan. 28, 2010) (dismissing TILA claim for  
8 failure to plead facts showing defendants to be "creditors" under 15 U.S.C. § 1602(f)). In  
9 TILA a creditor is defined as:

10 [A] person who both (1) regularly extends, whether in connection with loans,  
11 sales of property or services, or otherwise, consumer credit which is payable  
12 by agreement in more than four installments of for which the payment of a  
13 finance charge is or may be required, and (2) is the person who the debt arising  
from the consumer credit transaction is initially payable on the face of the  
evidence of indebtedness or, if there is no such indebtedness, by agreement.

14 15 U.S.C. § 1602(f). The Amended complaint does not allege that either MTC or MERS fall  
15 within that definition. Instead, Plaintiff names Defendant Homeplaceloans.com as the party  
16 with whom he entered the loan agreement. (Doc. #27 at 14.) MTC, the foreclosure trustee,  
17 and MERS, the beneficiary under the deed of trust, are not alleged to be TILA creditors and,  
18 therefore, cannot be liable to Plaintiff for any violation of TILA. The TILA claims in the  
19 Amended Complaint against MTC and MERS are dismissed for failure to state a claim.

## 20 **B. Plaintiff's Action to Quiet Title**

21 Plaintiff's Amended Complaint also brings an action to quiet title in relation to all  
22 defendants. MERS argues that Plaintiff has not alleged that MERS claims any title interest  
23 in the subject property, and, therefore, MERS is not a proper party to this quiet title action  
24 under A.R.S. § 12-1101. Even in the Response, Plaintiff makes no such allegation.  
25 Therefore, MERS is not a proper party.

26 MTC argues that A.R.S. § 33-807(E) bars the joinder of trustees in this type of action.  
27 The Court agrees, as set forth in the next section, and thus MTC is not a proper party to this  
28 quiet title action.

1           Therefore, as to both MTC and MERS, Plaintiff's Amended Complaint is dismissed  
2 pursuant to Rule 12(b)(6) for failure to state a claim. Plaintiff has already been permitted to  
3 amend the complaint once and has not moved for another amendment.<sup>1</sup> Generally, leave to  
4 amend a complaint is within the Court's sound discretion. When dismissing for failure to  
5 state a claim, the Court should grant leave to amend unless the Court determines that the  
6 pleading could not possibly be cured by the allegations of other facts. *Doe v. United States*,  
7 58 F.3d 494, 497 (9th Cir. 1995); *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)  
8 ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend.")  
9 Here, the Court finds that further amendment would be unlikely to cure the defects in  
10 Plaintiff's TILA claims and quiet title action as to MTC and MERS. Thus, the Court will  
11 dismiss the Amended Complaint with prejudice as to MTC and MERS.

12 **III. MTC's Motion to Dismiss Pursuant to A.R.S. § 33-807(E)**

13           MTC also argues that because Plaintiff failed to allege any violation of Arizona's  
14 Trust Deed statutes under Chapter 6.1 of Title 33, A.R.S. § 33-801, *et seq.* (2007), or any  
15 violation of the provisions of the deed of trust, MTC should not have been named as a party.  
16 A.R.S. § 33-807(E) provides:

17           The trustee need only be joined as a party in legal actions pertaining to a  
18 breach of the trustee's obligation under this chapter or under the deed of trust.  
19 Any order of the court entered against the beneficiary is binding upon the  
20 trustee with respect to any actions that the trustee is authorized to take by the  
trust deed or by this chapter. If the trustee is joined as a party in any other  
action, the trustee is entitled to be immediately dismissed and to recover costs  
and reasonable attorney fees from the person joining the trustee.

21 This section limits the joinder of trustees in litigation not premised on an alleged breach of  
22 their duties as trustees.

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25           <sup>1</sup> Plaintiff filed a "Memorandum in Support of Verified Amended Complaint" (Doc.  
26 #47) which could be *very* broadly construed as an attempt to file a Motion for Leave to File  
27 Second Amended Complaint and Proposed Second Amended Complaint. However, this is  
28 not the form of the filing and even so considered the proposed amended complaint would not  
overcome the deficiencies outlined in this Order. The Court will disregard this unauthorized  
supplemental briefing.

1 Here, Plaintiff is not alleging any such violation of MTC's obligations under the deed  
2 of trust or the Trust Deed statutes. Neither the TILA claim nor the quiet title action touch  
3 to these issues. Therefore, Section 33-807(B) entitles MTC to immediate dismissal.

4 MTC has requested its attorneys' fees and court costs for having to defend against  
5 Plaintiffs' action. Section 33-807(E) provides that "If the trustee is joined as a party in any  
6 other action, the trustee *is entitled* to be immediately dismissed *and to recover costs and*  
7 *reasonable attorney fees from the person joining the trustee.*" (Emphasis added.) MTC may  
8 file a motion for attorneys fees and costs in accordance with Local Rule of Civil Procedure  
9 54.2.

#### 10 **IV. MERS's Motion to Dismiss Pursuant to Rule 12(b)(5)**

11 MERS also moved to dismiss the Amended Complaint for improper service under  
12 Federal Rule of Civil Procedure 12(b)(5). However, the Court finds the record to reveal the  
13 *pro se* Plaintiff's diligent effort to effect service. Further, an affidavit of service of MERS,  
14 dated October 28, 2009, appears in the record. (Doc. # 54.) Thus, the motion to dismiss on  
15 this basis will be denied.

#### 16 **V. Entry of Judgment under Rule 54(b)**

17 Rule 54(b) of the Federal Rules of Civil Procedure provides:

18 When more than one claim for relief is presented in an action,  
19 whether as a claim, counterclaim, cross-claim, or third-party  
20 claim, or when multiple parties are involved, the court may  
21 direct the entry of a final judgment as to one or more but fewer  
22 than all of the claims or parties only upon an express  
23 determination that there is no just reason for delay and upon an  
24 express direction for the entry of judgment.

25 As the Supreme Court instructs:

26 A district court must first determine that it is dealing with a  
27 "final judgment." It must be a "judgment" in the sense that it is  
28 a decision upon a cognizable claim for relief, and it must be  
"final" in the sense that it is "an ultimate disposition of an  
individual claim entered in the course of a multiple claims  
action."

1 Once having found finality, the district court must go on to  
2 determine whether there is any just reason for delay. Not all  
3 final judgments on individual claims should be immediately  
4 appealable, even if they are in some sense separable from the  
5 remaining unresolved claims. The function of the district court  
6 under the Rule is to act as a “dispatcher.” It is left to the sound  
7 judicial discretion of the district court to determine the  
8 “appropriate time” when each final decision in a multiple claims  
9 action is ready for appeal. This discretion is to be exercised “in  
10 the interest of sound judicial administration.”

11 Thus, in deciding whether there are no just reasons to delay the  
12 appeal of individual final judgments . . . a district court must  
13 take into account judicial administrative interests as well as the  
14 equities involved. Consideration of the former is necessary to  
15 assure that application of the Rule effectively “preserves the  
16 historic federal policy against piecemeal appeals.”

17 *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7-8 (1980) (citations omitted).

18 The Court finds that this Order disposes finally of Plaintiff’s claims against MTC and  
19 MERS. Given that the only remaining defendants in this action have not yet responded to  
20 the complaint, there may be a lengthy period before the remaining claims are completely  
21 resolved. Further, the remaining defendants appear to be differently situated and their  
22 adjudication will concern different issues. Therefore, the Court finds no just reason for delay  
23 and will direct entry of final judgment as to MTC and MERS under Rule 54(b).

24 Based on the foregoing,

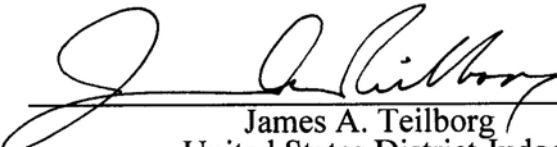
25 **IT IS ORDERED** that MERS’s motion to dismiss (Doc. #30) based on Rule 12(b)(6)  
26 is **GRANTED**; MERS’s motion to dismiss (Doc. #30) based on Rule 12(b)(5) is **DENIED**.

27 **IT IS FURTHER ORDERED** that MTC’s motion to dismiss (Doc. #29) based on  
28 Rule 12(b)(6) is **GRANTED**; MTC’s motion for fees and costs (Doc. #29) is **DENIED**  
**WITHOUT PREJUDICE**, with leave to re-file pursuant to LRCiv 54.2.

**IT IS FURTHER ORDERED** that the Clerk shall enter judgment of dismissal, with  
prejudice, as to MERS and MTC.

1           **IT IS FURTHER ORDERED** that Plaintiff has 30 days to re-move for an entry of  
2 default under Rule 55(a) against the two remaining defendants, Homeplaceloans.com and  
3 IndyMac Bank FSB.

4           DATED this 5<sup>th</sup> day of April, 2010.

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8           James A. Teilborg  
              United States District Judge